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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 57

FAWCETT PUBLICATIONS, INC.,
Appellant,

VERSUS

DENNIT MORRIS,
Appellee.

Appeal from the Supreme Court of the State of Oklahoma

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

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February, 1963.

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In the
Supreme Court of the United States
OCTOBER TERM, 1962

No. 741

FAWCETT PUBLICATIONS, INC.,
Appellant,

VERSUS

DENNIT MORRIS,
Appellee.

Appeal from the Supreme Court of the State of Oklahoma

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

MOTION TO DISMISS

Appellee in the above entitled case moves to dismiss on the grounds that the appeal: (1) does not present a substantial federal question; (2) that the federal question sought to be reviewed was not timely or properly raised; (3) and that the judgment of the lower court rests on an adequate non-federal basis, all of which is more specifically set out in the accompanying brief.

BRIEF

A. PRELIMINARY STATEMENT

Inasmuch as appellant's Questions 2, 3 and 4[1] presented, do not draw into question the validity of any Oklahoma statute on the ground that it is repugnant to the Constitution, treaties or laws of the United States and therefore not proper questions to be considered on appeal under 28 U.S.C. 1257 (2), this brief will be devoted to Question 1 only.

B. STATEMENT OF THE CASE

After service of summons was had on appellant pursuant to the appropriate Oklahoma jurisdictional statutes,[2] appellant filed a special appearance, plea of no jurisdiction and motion to quash (R. 12, 13). There was no allegation in appellant's special plea that the Oklahoma jurisdictional statutes, *supra*, had been unconstitutionally applied, but only that the Oklahoma Court was improperly exercising *in personam* jurisdiction over appellant (R. 12, 13). The journal entry of order made by the trial court overruling appellant's special plea to the jurisdiction and motion to quash made a finding that appellant was "doing business" in the State of Oklahoma and therefore amenable to the laws of the State. No finding or ruling with regard to whether or not the jurisdictional statutes, *supra*, were repugnant to the Constitution of the United States was made (R. 51, 52).

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[1] Appellant's Jurisdictional Statement, 3.

[2] Title 18, Okla. Stat., Sec. 1.17, and 472 Laws of 1961.

When appellant filed its petition in error in the Supreme Court of Oklahoma, appellant did not raise the question as to whether or not the Oklahoma jurisdictional statutes, *supra*, were being unconstitutionally applied, but only set forth that the trial court erred in overruling appellant's special appearance and motion to quash.[3]

When the Supreme Court of the State of Oklahoma considered appellant's appeal from the trial court, the court took particular note of the fact that appellant had not raised a question of due process under the Fourteenth Amendment to the Constitution of the United States.[4]

The first attempt that appellant made to challenge the application of the Oklahoma jurisdictional statutes, *supra*, on the grounds of their being unconstitutionally applied, was in appellant's petition for rehearing and accompanying brief.

1. The appeal does not present a substantial question.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C., § 1257(2) that a substantial question be properly raised in the state court proceedings. If the question is frivolous or has been foreclosed by a prior decision of the Supreme Court, it is not to be deemed a "substantial" federal question. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308; *Zucht* v. *King*, 260 U.S. 174; *Palmer Oil Corporation* v. *Amerada Corporation*, 343 U.S. 390.

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[3] See paragraphs 8 and 20 of appellant's Petition in Error to the Supreme Court of Oklahoma.

[4] *Fawcett Publications Inc.* v. *Morris*, 377 P.2d 45; Jurisdictional Statement, 7a, 8a.

Appellant raised no federal question in the courts below, and the Supreme Court of Oklahoma based its opinion on state law; therefore, no substantial federal question is presented. *Black* v. *Cutter Laboratories*, 351 U.S. 292.

2. The Federal Question sought to be reviewed was not timely or properly raised.

Under 28 U.S.C., § 1257(2), insofar as the case at bar is concerned, the Oklahoma jurisdictional statutes, *supra*, must have drawn into issue in the trial court and the statutes held valid as against the attack of appellant herein that they were repugnant to a constitutional guaranty, inasmuch as the Oklahoma Supreme Court has said that it will not consider the constitutionality of a statute raised for the first time on appeal. *Mo., Kan., and Tex. R. Company* v. *Prince*, 133 Okla. 228, 271 Pac. 253; *Garman* v. *Myers*, 183 Okla. 141, 80 P.2d 624; *First National Bank of Alex* v. *Southland Production Company*, 189 Okla. 9, 112 P.2d 1087; *Springfield Fire and Marine Insurance Company* v. *Biggs*, 295 P.2d 790; *Birmingham Fire Insurance Company* v. *Bond*, 301 P.2d 361; *Simons* v. *Brashears Transfer and Storage*, 344 P.2d 1107.

Although appellant objected to the jurisdiction of the Oklahoma court from the time summons was served, appellant never contended that the jurisdictional statutes, *supra*, had been unconstitutionally applied. The first attempt to raise the question by appellant was in its petition for rehearing before the Supreme Court of the State of Oklahoma. Appellant's petition for rehearing was dismissed by the court without an opinion. This being true, there

was not a "substantial" federal question raised nor is there one present at this time for consideration by this Court. *Hanson* v. *Denckla*, 357 U.S. 235; *Wilson* v. *Cook*, 327 U.S. 474; *Black* v. *Cutter Laboratories, supra.*

The rules to be applied as to whether or not a federal question has been properly raised in the state court are rules promulgated by the legislative bodies and appellate courts of the respective states. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278. Appellant's contention throughout the case, commencing in the trial court and continuing through the Supreme Court of the State of Oklahoma was that it was not "doing business" within the State of Oklahoma and therefore not amenable to the Oklahoma jurisdictional statutes, *supra*. The jurisdiction of the Supreme Court of the United States would in this case depend upon appellant's having attacked the constitutionality of the Oklahoma jurisdictional statutes, *supra*, in such a distinct manner as to leave no doubt that it intended and was asserting a federal right. *Oxley Stave Company* v. *Butler County*, 166 U.S. 648. It will be noted from an examination of the record that appellant in its special appearance, plea of no jurisdiction and motion to quash (R. 12, 14), made no mention of the Oklahoma jurisdictional statutes, *supra*. The same is true with regard to appellant's motion for a new trial (R. 225, 226, 227). The only mention made by appellant in its petition in error to the Supreme Court of the State of Oklahoma was that it was error for the state court to assume jurisdiction over appellant.[5] And it will be further noted that therein appellant made no ref-

[5] Paragraphs 8 and 20, appellant's Petition in Error.

erence to the Oklahoma jurisdictional statutes, *supra*, did not identify the statutes now complained of, nor made any allegations at any point that the jurisdictional statutes, *supra*, had been unconstitutionally applied. When the validity of a state statute is drawn into question, it must be clearly identified. *Yazoo and N.V.R. Company* v. *Adams*, 180 U.S. 41.

If a state statute is not considered by the highest appellate court in a particular state in light of a federal question properly presented, the Supreme Court of the United States is without jurisdiction to review. *Beck* v. *Washington*, 369 U.S. 541.

In view of the failure of appellant to have raised a federal question in compliance with state rules of procedure, the questions now presented by appellant cannot be reviewed by the Supreme Court of the United States. *In re Lamkin*, 355 U.S. 59; *Ferguson* v. *Georgia*, 365 U.S. 570. If the state procedural rule which forbids the raising of a question at a late stage in the proceedings is reasonable, it is considered a valid exercise of state power. *Williams* v. *Georgia*, 349 U.S. 375. When appellant belatedly attempted to raise the constitutional question in his petition for rehearing before the Oklahoma Supreme Court, the court dismissed the petition without an opinion. The failure to render an opinion raises a presumption that the court considered the raising of the constitutional issue on a petition for rehearing as untimely under the rules of procedure. *Mutual Life Insurance Company* v. *McGrew*, 188 U.S. 291; *Bailey* v. *Anderson*, 326 U.S. 203.

Appellant's failure to assert a federal constitutional question in the trial court and the Oklahoma Supreme Court's refusal to consider the question on a petition for rehearing precludes review by the Supreme Court of the United States. *Stenbridge* v. *Georgia*, 343 U.S. 541; *Radio Station WOW* v. *Johnson*, 326 U.S. 120; *Hanson* v. *Denckla*, *supra*; *Herndon* v. *Georgia*, 295 U.S. 441; *American Security Company* v. *Baldwin*, 387 U.S. 156; *Forbes* v. *State Counsel*, 216 U.S. 396; *Simmerman* v. *Nebraska*, 116 U.S. 54.

Appellant contends[6] that the opinion of the Supreme Court of the State of Oklahoma was "novel, unprecedented, and wholly unanticipated" and then claims surprise and tries to bring itself within the rule promulgated in *State of Missouri ex rel. Missouri Insurance Commission* v. *Gehner*, 281 U.S. 313, which would allow a review by the Supreme Court of the United States if appellant could not have reasonably anticipated how the Oklahoma Supreme Court would rule with regard to appellant's federal rights.

Appellant, in alleging that it was surprised by the "unanticipated" opinion of the Oklahoma Supreme Court, has set out that this was the first time the Oklahoma Supreme Court had ever applied the Oklahoma jurisdictional statutes, *supra*, to subject an out-of-state publishing company to suit in Oklahoma for libel. This may be true. However, appellant or any other publisher has never been given immunity by the Oklahoma law from suit nor has a publishing company been placed in a category which is special

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[6] Appellant's Jurisdictional Statement, pp. 19, 20.

or separate and apart from all other industries. There are numerous prior Oklahoma decisions dealing with the question of foreign corporations "doing business" in Oklahoma, their respective types of business being many and varied.[7] For appellant to conclude that it should be treated differently by the Oklahoma Supreme Court than any other industry, and to present such an argument to this Court as a basis for "surprise" is an imposition upon the credulity of reasonable men.

Appellant could not plead ignorance of the cited cases,[8] and was therefore bound to anticipate the probability of a similar ruling in its own case. *Herndon* v. *Georgia*, *supra*.

Appellant asserts[9] that it properly raised the question of the constitutionality of the Oklahoma jurisdictional statutes, *supra*, by filing a motion to quash and a plea to the jurisdiction and cites as authority therefor *First State Bank of Tuskahoma* v. *J. B. Klein Iron and Foundry Company*, 180 Okla. 42, 68 P.2d 777; and *Southard* v. *Oil Equipment Corporation*, 296 P.2d 780. The cases cited are authority for the statement that a motion to quash and special plea to the jurisdiction is the proper way to attack jurisdiction; however, neither case is authority for the assertion

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[7] *Wills* v. *National Mineral Co.* (1936), 176 Okla. 193, 55 P.2d 499 (manufacturer of barber and beauty shop equipment and appliances); *Chain Belt Co.* v. *Oklahoma Tax Commission* (1941), 189 Okla. 248, 116 P.2d 899 (manufacturer of belts); *S. Howe Co.* v. *W. P. Milling Co.* (1954) 277 P.2d 655 (manufacturer of milling machinery); *Superior Distributing Corp.* v. *Hargrove* (1957), 312 P.2d 893 (manufacturer of pop corn machines); *Able* v. *Albina Engine & Machine Works* (C.C.A. 10th, 1960), 284 F.2d 510.

[8] See Footnote 7.

[9] Appellant's Jurisdictional Statement, p. 16.

that a motion to quash and a special plea to the jurisdiction is the proper way to raise a *constitutional* question, appellant's statement notwithstanding.[10]

Appellant then takes the position that its assertion that the constitutional question was properly raised by its motion to quash and special plea to the jurisdiction with the statement that the question *obviously was raised* inasmuch as the trial judge in his opinion cited *International Shoe Company* v. *Washington*, 326 U.S. 310 and *McGee* v. *International Life Insurance Company*, 355 U.S. 220 and other federal decisions involving due process and the validity of state statutes authorizing substitute service on non-resident defendants. This circuitous reasoning, of course, avoids the fact that each of the cited cases had to deal with whether or not a non-resident corporation was "doing business" within the state to determine whether or not the state's jurisdictional statute had been unconstitutionally applied, after the constitutional question had been timely and properly raised. Each of the cited cases also sets out some standard of conduct within the forum state for determining whether or not the non-resident corporation was engaging in sufficient activities within the state as to make it amenable to local service of process. Appel-

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[10] The *Tuskahoma* case, *supra*, deals with the question of whether or not service would be good against a defendant not a resident of the county wherein the court was sitting, where plaintiff had failed to plead a good joint cause of action against both the resident defendant and non-resident defendant. The *Southard* case, *supra*, deals with whether or not a personal judgment can be rendered against individual partners of a partnership without first having obtained judgment against the partnership as an entity.

lant further states[11] that it is beyond doubt that the Oklahoma Supreme Court has construed the term "doing business" in the jurisdictional statutes to be co-extensive and synonymous with the Fourteenth Amendment due process definition of that term as delineated in *International Shoe* case, *supra*, and other federal cases cited.

It is entirely possible that the state court, in arriving at its opinion, used the "doing business" standards which were given birth in *International Shoe* case, *supra*, and attained growth in subsequent federal and state decisions. However, this does not give rise to a presumption that such standards were applied by the court to determine whether or not the Oklahoma jurisdictional statutes were unconstitutionally applied under the United States constitutional guaranty of due process. *Even if appellant had properly raised a federal question, the Oklahoma Supreme Court would still have had to make a determination as to whether or not appellant was "doing business" in Oklahoma within the meaning of the Oklahoma jurisdictional statutes, supra,* and then would have had to further determine if the standards applied under Oklahoma law denied appellant a right under the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the United States should not pass on a federal question discussed in an opinion of a state court where it appears that the judgment below rests on adequate state grounds. *Black v. Cutter Laboratories, supra.*

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[11] Appellant's Jurisdictional Statement, p. 18.

3. That the judgment rests on an adequate non-federal ground.

In as much as appellant failed to raise a federal question in the proceedings below, it must follow that the opinion of the Supreme Court of Oklahoma is based on a "non-federal" ground. The question which would arise in connection therewith is: Is the non-federal ground adequate to support the judgment of the state court? And if the non-federal ground is independent of any federal ground and adequate to support the judgment of the state court, then the Supreme Court of the United States lacks jurisdiction to review. *Fox Film Corp.* v. *Muller*, 296 U.S. 207.

The agreement between appellant and Mid-Continent News Company, one of its Oklahoma distributors (Pltf.'s Ex. 3, R. 273, 274, 275), is quite detailed and conclusive as to Mid-Continent's duties with regard to the sale and distribution of appellant's publications in Oklahoma. The agreement purports to be one between "independent contractors"; however, an examination of same quickly reveals that appellant, by the terms of the agreement, controls the details of how Mid-Continent is to distribute and sell appellant's publications.

In determining whether an agreement is one of agency or between independent contractors, the controlling and decisive test is: Does principal have the right to control the physical details of the work done by agent, or, does the latter represent the former only as to the result to be accomplished. *Yellow Cab Co.* v. *Wills*, 199 Okla. 272, 185 P.2d 689.

It will be noted that appellant pu' on no evidence in the trial of the case and therefore the evidence of appellee was uncontradicted. When evidence is undisputed, the question of whether the relationship of the parties is that of independent contractor and contractee, or employer and employee is one of law for determination by the court. *Fairmont Creamery Company* v. *Carsten*, 175 Okla. 592, 55 P.2d 757.

Although neither the trial court nor the Supreme Court of Oklahoma specifically hold Mid-Continent to be an agent of appellant, it is obvious that each court considered Mid-Continent as appellant's agent. The trial court held that the written agreement and the activities of appellant's agent, Mead, "creates a branch office of Fawcett (appellant) in Oklahoma." The Supreme Court of Oklahoma found, and held, from such evidence that "Mid-Continent was little more than a mere conduit through which Fawcett (appellant) exercised its own free and unhampered discretion."

The question of agency would be a question for the state court to resolve, and the finding that agency existed would be an adequate non-federal ground. *Curtis Publishing Company* v. *Cassel*, 301 F.2d 132 (C.C.A. 10th, 1962), *National Carbide Corp.* v. *Commissioner of Internal Revenue*, 336 U.S. 422.

C. CONCLUSION

For the reasons stated, appellee contends that appellants appeal should be dismissed.

Respectfully submitted,

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